

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LOUIS G. DUCLOS,

Plaintiff

v.

DANIEL GILDEA,

Defendant

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Civil No. 03-254-P-C

NH Civil No. 03-004560-JD

**ORDER ON LETTER MOTION TO RECONSIDER ORDER DENYING  
MOTION TO APPOINT COUNSEL AND  
RECOMMENDED DECISION ON MOTION TO DISMISS**

Louis G. Duclos has filed a Bivens<sup>1</sup> action (Docket No. 2) against Daniel Gildea, a United States Probation Officer involved in a criminal prosecution of Duclos in the District of New Hampshire. After a two day trial in October 1998, Duclos was found guilty of filing false statements with the United States Post Office. Earlier, I denied Duclos's motion for appointment of counsel. (Docket No. 34.) Pending before the court is Gildea's motion to dismiss the action (Docket No. 20) and a motion by Duclos to reconsider my order denying the appointment of counsel that is incorporated with an initial response to the motion to dismiss (Docket No. 39). I now **DENY** the motion for reconsideration and I recommend that the court **GRANT** the defendant's motion to dismiss.

<sup>1</sup>

Bivens v. Six Unknown Named Agents of Fed. Bureau Narcotics, 403 U.S. 388 (1971).

## ***Background***

### ***Complaint allegations***

In his complaint, Duclos alleges that during the investigation of the federal false statement charges against Duclos, Gildea secured a no-contact order against Duclos vis-à-vis Gildea's fiancé, Angela Gillis which hindered Duclos's ability to corroborate his defense. During this period, Gildea demanded that Duclos release Gillis's personal property from Duclos's residence. Furthermore, Gildea colluded with defense counsel in efforts to retrieve Gillis's personal property from his residence.<sup>2</sup> The United States Probation office entered Duclos's residence to retrieve electronic equipment that had been attached to Duclos's telephone and seized documents that were eventually entered into the record at Duclos's trial as Exhibits 4 and 5.

Duclos brings two counts. One count charges an illegal search and seizure under the Fourth Amendment, alleging that Gildea entered his home to remove investigatory electronic tracking equipment and took Duclos's personal documents without a search warrant. The second count asserts that his due process and Fifth Amendment rights were infringed when Gildea used the stolen document in court during Duclos's trial. With respect to the requested relief, Duclos seeks a declaration that Gildea violated his constitutional rights and an award of \$100,000 and/or \$200,000 on each count.

### ***Motion to Dismiss***

In his motion to dismiss, Gildea proffers four grounds for dismissal of this action. One, the action is barred by Heck v. Humphrey, 512 U.S. 477 (1994) because if Gildea prevailed in this civil suit this judgment would imply the invalidity of Gildea's

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<sup>2</sup> There are more allegations concerning the Gillis property and Duclos's sister's involvement in removing this property from Duclos's residence but I do not see how Duclos has any standing to bring claims on behalf of these third parties.

conviction. Two, the action is barred because the applicable statute of limitation, New Hampshire Revised Statute § 508:4(I), is three years. Three, Gildea has already litigated these claims in the District of New Hampshire and, thus, this suit is barred by the doctrine of res judicata. And, four, dismissal is appropriate because Duclos has not effected proper service on Gildea.

***Response and Motion for Reconsideration***

In his response to the motion to dismiss and to this court's order denying him appointment of counsel, Duclos states that, with respect to Gildea's statute of limitation ground, he has not been able to confirm that the law is as represented and he relays that he is forced to rely on his "reasonable diligence" which he states he began exercising in 1998. He represents that he can document his efforts to obtain information under the Freedom of Information Act and his earlier efforts to ascertain if it was the United States Postal Service that was responsible for entering his residence and removing documents (rather than Gildea). By that process of elimination, Duclos asserts, he has determined that Gildea is the only possible perpetrator.

Duclos states that he believes that he "is being treated fundamentally unfair" because he is forced to compete with the United States Attorney who represents Gildea, a government employee who does not deserve the benefit of free counsel. Duclos contends that this disparity violates his due process rights and he asks me to reconsider my prior order and appoint counsel.

***Discussion of Motion to Dismiss***

I recommend that the Court dismiss the suit on the grounds that it was filed long after the running of the applicable statute of limitation.

Under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, a constitutional tort claim against a federal agent is treated in the same manner as a 42 U.S.C. § 1983 suit against a state actor for violation of federal rights. 403 U.S. 388 (1971). State law provides the applicable statute of limitation for § 1983 actions. See Carreras-Rosa v. Alves-Cruz, 127 F.3d 172, 174 (1st Cir. 1997) (“The limitation period for filing this § 1983 claim is governed by the applicable state statute of limitations for personal injury actions.”). With respect to identifying the appropriate state statute of limitation, the United States Supreme Court’s Wilson v. Garcia, clarified that with respect to § 1983 complaints, “the one most appropriate statute of limitations” must be applied to all § 1983 claims. 471 U.S. 261, 275( 1985) (emphasis added). The same principles, then, hold for Bivens actions. See Rossiter v. Potter, 357 F.3d 26, 34 n. 7 (1st Cir. 2004) (Bivens is a court-created remedy that serves as an analogue to 42 U.S.C. § 1983. It would make little sense to apply different limitations periods to section 1983 claims and Bivens claims, both of which are “constitutional tort” actions that allow vindication of personal interests”); Pitts v. United States, 109 F.3d 832, 834 (1st Cir. 1997) (no dispute that the state statute of limitation applied in Bivens action).

New Hampshire law provides:

Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

N.H. Rev. Stat. § 508:4(I).

Duclos alleges that the impermissible search and seizure occurred on December 19, 1997. His trial occurred on October 7 and 8, 1998, and the two exhibits he alleges were the fruit of the illegal seizure were admitted into evidence at that juncture. (Mot. Dismiss Ex. E. at 2, 209, 213, 211, 215.) At trial the defense inquired of the government how it obtained the documents. (Id. at 209-17.) Shortly after trial, on December 18, 1998, Duclos filed a Bivens action alleging, among other things, that the government had illegally obtained the two exhibits. (Id. Ex. D.) Gildea was one of the defendants to that action and figured prominently in Duclos's allegations. (Id. ¶¶ 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 32, 34.) With respect to that action, Duclos was given the opportunity to amend that complaint to describe his basis or bases for invoking the court's subject matter jurisdiction and to plead specific cognizable causes of action with supporting facts. (Id. Ex. F. at 3.) Duclos did not comply with that order and the case was dismissed "for want of subject matter jurisdiction." (Id. Ex. G.)

While New Hampshire law sets the statute of limitation, federal law governs the date of accrual. Carreras-Rosa, 127 F.3d at 174. For § 1983 (and Bivens) actions the accrual period "'ordinarily starts when the plaintiff knows, or has reason to know, of the injury on which the action is based.'" Id. (quoting Rivera-Muriente v. Agosto-Alicea, 959 F.2d 349, 353 (1st Cir.1992)).

I cannot but conclude that Duclos's cause of action against Gildea began to accrue no later than December 1998 when he lodged his first Bivens action and, that as a consequence, the three-year statute of limitation ran long before October 20, 2003, when Duclos filed this action in the District of New Hampshire. It is true that the exhibits that Duclos attaches to his response confirm that he was seeking information through the

Freedom of Information Act in the summer of 2002. However, this does not alone establish due diligence vis-à-vis his claims against Gildea based on conduct that occurred more than three and a half years earlier. As Gildea points out in his res judicata argument, much of what is now alleged in the current complaint echoes what was alleged in the earlier action.

I have examined the cases cited by Duclos in his most recent pleading on this issue (Docket No. 42): Gonzalez v. United States, 284 F.3d 281, 288-91 (1st Cir. 2002) (discussing the discovery rule under the Federal Tort Claims Act, “observing the limitations period begins to run regardless of whether plaintiffs make inquiries, and regardless of whether they are correctly advised”), Geo. Knight & Co., Inc. V. Wyatt Co., 170 F.3d 210, 213 -14 (1st Cir. 1999) (discussing discovery rule in context of Massachusetts state law claims), and Cragin v. United States, 684 F.Supp. 746, 753-56 (D. Me. 1988) (conducting a thoroughgoing due diligence inquiry under the Federal Tort Claims Act and concluding that the statute of limitation had run). They do not persuade me that the facts of this case warrant any other conclusion but that Duclos’s three-year period for filing this suit expired long ago in view of his keen awareness by December 1998 that Gilda was actively involved in circumstances surrounding the allegedly unconstitutional search and seizure.<sup>3</sup>

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<sup>3</sup> I also find Gildea’s argument vis-à-vis the applicability of the Heck persuasive as to Duclos’s allegations pertaining to the use of the seized items in his criminal trial. Similarly, there is an enticing case for res judicata, although the order dismissing that case did provide that the dismissal was for a want of subject matter jurisdiction which would not be a disposition on the merits. I am less enamored with Gildea’s fourth ground, complaining of improper service. Gildea has ably responded thus far to this action, even though Duclos, after being unsuccessful in obtaining waivers, resorted only to mail service without attempting service in hand.

All told, Duclos has only responded to the statute of limitation ground in his two pleadings on the subject so I give him the ‘benefit’ of the doubt by analyzing the propriety of dismissal on the one issue he joined.

### ***Motion to Reconsider***

With respect to Duclos's complaint about my refusal to appoint counsel, this court is unable to compel an attorney to represent Duclos in this civil action. See Durre v. Dempsey, 869 F.2d 543, 547 (10th Cir. 1989). Even though Duclos may be disadvantaged by his pro se status, the onus is on him to prosecute this action, either on his own or by seeking assistance of counsel. See id. I add that, from the court's vantage point, the statute of limitation bar in this case does not appear to be the type of defense against which counsel could have advocated in such a way as to change the outcome.

### ***Conclusion***

I **DENY** Duclos's motion for reconsideration of my order denying appointment of counsel. And, because I conclude that this action is barred by the New Hampshire statute of limitation, I recommend that the Court **GRANT** Gildea's motion to dismiss.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated March 30, 2004

DUCLOS v. GILDEA

Assigned to: JUDGE GENE CARTER

Referred to: MAG. JUDGE MARGARET J.

Date Filed: 10/27/03

Jury Demand: Plaintiff

KRAVCHUK  
Demand: \$  
Lead Docket: None  
Related Cases: None  
Case in other court: U.S. District Court - District of  
New Hampshire, 03-00456-JD  
Cause: 28:1983 Civil Rights

Nature of Suit: 550 Prisoner: Civil  
Rights  
Jurisdiction: Federal Question

**Plaintiff**

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